TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~442~~ 226 110

THE CHESAPEAKE AND OHIO CANAL COMPANY

vs.

GEORGE HILL, JR.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 23, 1870.

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a *Certificate to record.*

CLERK'S OFFICE SUPREME COURT
OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that the originals—of which the following writings are true and complete copies—are on file and of record in the clerk's office of said court; and that said originals together constitute the record of the proceedings of said court in a certain cause therein depending and lately decided, entitled George Hill, jr., vs. The Chesapeake and Ohio Canal Company. No. 739. Equity docket 8.

In testimony whereof I hereto subscribe my name and affix the seal of said court, this 10th day of December, 1870.

[SEAL.] R. J. MEIGS, *Clerk, &c.*
By R. J. MEIGS, JR., *Ass't Clerk.*

1 *Original bill.—Filed July 30, 1866.*

To the honorable judges of the supreme court of the District of Columbia, sitting in equity.

The bill of complaint of George Hill, jr., a citizen of Georgetown, in said district, against The Chesapeake and Ohio Canal Company, a corporate body, having a habitat in said District, and against its agents and servants, whom your orator prays may be made defendants to this his bill of complaint, humbly shows to your honors:

That your orator is the owner of a paper mill in Georgetown, at the corner of Potomac and Water streets, the motive power therein being water flowing from the canal, the property of said defendant, in which said mill and in fitting the same for useful mechanical purposes, your orator has invested large sums of money, to wit, the sum of forty thousand dollars.

That, by certain articles of agreement, bearing date the 21st day of January, 1864, made and entered into between the said defendant and your orator, it was agreed that your orator, for the term of twenty
2 years from and after the 1st day of July, A. D. 1864, should be at liberty to draw off from the said canal two hundred square inches of water, to be used for propelling the machinery of said paper mill, at a certain stipulated price, to wit: $500 per annum for the first ten years and $600 for the other ten years of said term, payable quarter yearly; that the said articles of agreement were made and entered into several months in advance of the erection of said paper mill and the machinery therein, which erection was done and made by your orator in the confidence that said water-power would be secured to him at said mill.

That your orator has fully complied with the provisions in said articles of agreement by him to be done and performed, and that the waste of water, upon which the defendant claims the right to inflict the grievance and damage to your orator, hereinafter complained of, is not owing to any of the contingencies in which, by the articles of agreement, the said defendants are authorized to diminish or stop the supply of water, but is owing exclusively to the inaccurate and erroneous measurement of the water, insisted upon by said defendants.

That, by a resolution made and passed on the 20th day of April
3 last, by the board of directors of the said Canal Company, it was resolved that your orator should be at liberty to draw from said

canal whatever quantity of water might be necessary to propel the machinery in his said paper mill, at and upon a certain stipulated bonus and rent per inch, and your orator avers that he always was ready and willing, and here proffers himself ready and willing to pay the stipulated bonus and rent per inch for the quantity additional to said two hundred inches (if any) so drawn off by him for the purposes aforesaid.

That, by a certain other resolution of said board, made and passed on the 20th day of February, 1865, the said defendants resolved and agreed that the gauge to measure the quantity of water used by this and other mills drawing water from said canal, should be placed at the most convenient point, to give the mills the full quantity of water for which they were paying, and that your orator declined to accept the lease or grant of said water-power until the passage of said last-named resolution, which was passed at your orator's request and instance, and the same entered into and became a portion of the aforesaid articles of agreement.

4 That the water used by your orator is carried a distance of from 350 to 400 feet from the said canal to your orator's mill, so that the loss by friction is such that at the point of discharge of said water at the wheels of your orator's mill, the quantity of water is but 108 inches instead of the 200 inches so as aforesaid granted to him, and which he claims he is entitled to have at the point where the water first becomes of utility to him; and that the said quantity of water, reduced as the same would be by the system of measurement practiced and claimed as correct by said defendant, would be insufficient to propel the machinery of said mill.

That your orator has paid in full for the use of said water up to and including the quarter year ending on the 31st day of March, A. D. 1866, as by reference to the voucher therefor, herewith exhibited as a part hereof, marked "G. H., jr., No. 2," and has offered to pay to the duly authorized collector for said defendant the sum due for the quarter year ending on the 30th day of June last, to wit, the sum of one hundred and twenty-five dollars, (and this amount he brings into

5 court, and here tenders the same to said defendant,) according to said articles of agreement, but that the said collector refused to receive the same unless your would also pay the further sum of two thousand eight hundred and sixteen $\frac{67}{100}$ dollars, the said collector stating that he was instructed by the officers of said defendant to claim this additional sum for and upon account of five hundred inches of water (additional to the two hundred) which the said defendant alleges that your orator is now drawing off from said canal, and using in the propulsion of the machinery at said paper mill, the said sum of $2,816 67, being made up by charging as bonus five dollars per inch, and as rent two $\frac{50}{100}$ dollars for the use of said additional five hundred inches of water.

That your orator avers and charges that a proper admeasurement of the water used by him at his said mill, if made at the point of discharge, will show that your orator is using but one hundred and eight (108) inches of water—much less than he is entitled to use according to said articles of agreement—and that the water from said canal, used by

6 the other mills in Georgetown is measured at the point of discharge at the wheels; and that even if the measurement is made at the opening of the trunk at the canal itself, no such extraordinary quantity of water can possibly be drawn off or used by your orator, and that the claim of the defendant that your orator is drawing the enormous amount of seven hundred inches of water is the result of grossly inaccurate

measurement and at an improper place for such measuring; that the gauge by which the said defendant pretends to measure the quantity is of such character and so placed as that it is impossible for more than one hundred and thirty (130) inches of water to pass through the same, and that if the said gauge were placed at the point of discharge, that no greater quantity of water than 130 inches would pass the same.

That all of the machinery of said paper mill was constructed in contemplation of the power of two hundred inches of water, and being upon the most approved and scientific pattern, that quantity is more than sufficient to propel the same, the uttermost capacity of the
7 wheels at your orator's said mill, being only one hundred and eight (108) inches, but that the officers of the said defendant inaccurately and erroneously assert that your orator is drawing off and using seven hundred inches of water, at your orator's said mill, and seek to enforce from him the payment of the large sum of money aforesaid for said additional quantity of water; and upon your orator's refusing to pay said sum of money, the said defendant, by its agent, John Cameron, notified your orator that he should stop and entirely cut off the supply of water to your orator's mill, and thereby inflict irretrievable injury and irreparable damage to your orator, and the said John Cameron attempted so to do on the 19th day of July instant, but was prevented from so doing by your orator in person, defending the spot, and your orator is apprehensive that the said defendant will cut off and stop the supply of water aforesaid, which will work irretrievable injury and damage to your orator, for which no adequate compensation can be made him, inasmuch as your orator would be compelled to suspend his daily work and
8 business, and would be unable to fill and furnish contracts and undertakings with his customers, some of whom are publishers of newspapers in this district, the daily issues of which are dependant upon the continuance of your orator's said business, and your orator is remediless by law in the premises, the said defendant being insolvent.

In consideration thereof your orator prays that your honors will issue the United States writ of injunction against the said defendant, prohibiting, enjoining, and restraining the said defendant, its agents and servants from molesting, interrupting, or diminishing the supply of water to your orator's paper mill in Georgetown, and that your orator may have such other and further relief as the case may require, and to your honors seem meet, &c. And as in duty, &c., your orator will ever pray, &c.

JONES & ASHFORD,
Solicitors for Complainant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

On this 21st day of July, 1866, personally appeared George Hill, jr., and made oath that the matters and things stated in the foregoing bill are true to the best of his knowledge & belief.

Before me.

M. V. BUCKLY, *J. P.* [SEAL.]

9 *Exhibit to bill.*—"*G. H., jr., No.* 1."

Articles of agreement, made and concluded this twenty-first day of January, in the year eighteen hundred and sixty-four, by and between The Chesapeake and Ohio Canal Company, of the one part, and George

Hill, jr., of Washington County, *with* District of Columbia, of the second part, witnesseth:

That the said party of the first part for and in consideration of the rents and covenants hereinafter mentioned, and on the part of the said party of the second part to be paid and performed, doth grant and agree to and with the said party of the second part, and his assigns, that the said party of the second part, and his assigns, shall have full right, permission, and authority, for the term of twenty years, from the first day of July, in the year eighteen hundred and sixty-four, and the same is hereby granted, to draw off from the Chesapeake and Ohio Canal at Georgetown, to be used at his property, at the corners of Potomac & Water streets, (from the level between locks No. four and No. five,) so much water as will pass through an aperture of two hundred square inches in an iron plate not exceeding an half inch in thickness, to be used solely for propelling the machinery of a paper mill and ap-
10 purtenant works; but on these express conditions, viz:

1st. That the said ape'ture shall form an opening in said plate of as many inches in height and as many inches in length, in the clear, as may be necessary to make out the number of square inches aforesaid (200) two hundred.

2nd. That the said ape'ture shall be so placed that its lower edge shall not be nearer to canal bottom proper than two feet.

3rd. That the said ape'ture shall be made plain and square through the said plate, and that no device or contrivance shall ever be made therein or in any way attached to or connected therewith, whereby a greater quantity of water can be drawn through the said ape'ture than if such device or contrivance had not been connected with or attached to the same.

4th. That a sliding gate or gates shall be placed in front of the said ape'ture so that the whole water-power hereby granted may be, as occasion under the provisions of this contract requires, entirely or partially stopped from passing through it.

5th. That the forebay or trunk for conducting the said water
11 through the canal bank from the said ape'ture shall be covered or bridged, and, together with the said ape'ture and sliding gate or gates, shall be so constructed and put in as not to prevent or interfere with, in any degree, the navigation of the canal, or the use of the towing path thereof; and that the said forebay or trunk, cover or bridge, ape'ture and sliding gate or gates shall be of good and substantial construction, and shall not occasion any leakage of the said canal, or in anywise endanger the security thereof, and shall be put down and constructed, and thereafter, during the continuance of the said term, kept in repai*d* at the sole cost of the said party of the second part or his assigns, under the special direction and superintendence, and subject, in every particular, to the approval of such officer of the said party of the first part as may be charged with that duty.

6th. That, in like manner, at the sole cost of the said party of the second part or his assigns, and under the special direction, superintendence, and approval of such officer of the said party of the first part as may be charged with that duty, shall such alterations from time to time be made in the said forebay or trunk, cover or bridge, ape'ture and sliding gate or gates as may be considered necessary by the
12 said party of the first part, or their officer charged with that duty, to prevent or lessen the inconvenience to the navigation of the said canal, and the use of its towing path, which may be found to arise from the use of the said water, or that may be thought necessary by

the said party of the first part for the greater security of the said canal, or of its works.

7th. That the officers and servants of the said party of the first part, with their horses and carts, shall have free ingress and egress to and from the premises used and occupied by the said party of the second part or assigns, at the point aforesaid, for the purpose of examining, repairing, and preserving the embankments and other parts of the said canal or its works without molestation or hinderance from any person whatever, and that the said officers and servants shall, in like manner, have free ingress and egress for the purpose of examining any and all the fixtures and works connected with the drawing off of the said water from the canal at the point aforesaid, for the purpose of ascertaining whether any defects exist therein which may occasion leakage from the said canal or endanger its security, or that of its works,
13 or whether, from any cause whatsoever, there may be more water drawn off from the said canal than is hereby granted.

8th. That the said party of the first part shall be at liberty, whenever it shall be requisite, in the opinion of their officer charged with such duty, to draw off the water from the said canal for the purpose of cleaning, repairing, or altering the same, or for any other necessary purpose, and shall also be at liberty to keep the water out of the said canal after the occurrence of a breach or breaches in it, or the failure of any of its works, for the purpose of its or their repair, without rendering the said party of the first part or their officers in any manner liable for damage for the failure of water at the point aforesaid, while such cleaning, repairing, or alteration is in progress, or such necessity exists, or during the repairs rendered necessary by such breach or breaches, or failure, and without subjecting the said party of the first part to any forfeiture of rents, unless the water should be so drawn off or remain out for a connected period of at least ten days; then, and in all such cases, a pro rata deduction shall be made from the rent for the days during which the water is so drawn off or remains out.

14 9th. That whenever the said party of the second part or his assigns suspend the use of the water-power hereby granted in propelling his or their machinery, the aforesaid sliding gate or gates shall be tightly closed by him or them, and shall so remain tightly closed until he or they have occasion to resume the use of the said water-power, (without being entitled in consequence to any abatement of rent,) in order that there shall be no unnecessary waste or leakage of water.

And the said party of the second part, in consideration of the premises, for himself and his assigns, doth covenant and agree to and with the said party of the first part that he and his assigns, during the continuance of the said term of years commencing on the first day of July, in the year eighteen hundred and sixty-four as aforesaid, will pay for the use of the said water to the said party of the first part an annual rent of five hundred ($500) dollars for the first ten years of the aforesaid term, and an annual rent of six hundred ($600) dollars for the succeeding ten years of said term, in equal quarter-yearly payments, viz: on the thirty first day of March, thirtieth day of June, thirtieth
15 day of September, and thirty-first day of December, in each and every year, and will abide by and perform each and all the conditions and stipulations on his or their part to be performed under the aforegoing provisions.

And it is hereby mutually understood and agreed, by and between the said parties that, if any quarter-yearly payment of the said rent shall be in arrear twenty days after the period aforesaid, stipulated for

the payment of the same, or if the said party of the second part and his assigns, shall fail to comply forthwith, upon being required so to do by the party of the first part or their officer charged with that duty, with any of the preceding conditions of the lease, or shall alter or enlarge the said forebay, or trunk, or ape'ture, or shall apply the water passing through the same to any other use or purpose than as aforesaid, without the special consent of the said party of the first part, signified in writing, under their seal, then, and in either case, it shall be lawful for the said party of the first part or their officer charged with that duty, to stop or cut off the supply of water at the point aforesaid, by closing the sliding gate or gates of the ape'ture aforesaid, or by any other means, without the abatement of the said rent, until the said
16 party of the second part or his assigns, shall make amends or satisfy the said party of the first part in the particular complained of; after which the said water shall be permitted to flow as before, subject to all the limitations, reservations, and conditions herein mentioned and contained. And in case there shall be a failure, neglect, or refusal to pay as aforesaid, the quarter-yearly rent, in any instance, for one-quarter of a year after the same shall have become due, then this lease may be forfeited and made void, at the option of the party of the first part, these rights in the party of the first part from the legal right of collecting the rent, or from proceeding against the party of the second part and his assigns, by suit, injunction, or otherwise.

And whereas the primary object of The Chesapeake and Ohio Canal is to afford navigation, and the means of easy transportation for produce and merchandise passing on the said canal and its branches, and at times there may not be found in the canal sufficient water to serve the purposes of the navigation of the said canal and its branches, (with such depth of water as may be deemed expedient by the party of the first part to be maintained therein for the purposes of
17 said navigation,) and also to propel machinery, it is further mutually understood and agreed between the said parties that, whenever, in the opinion of the officers charged with that duty, by the said party of the first part, or the said officers may, for the time, in their or his opinion requisite, limit the quantity of water to be drawn from the said canal according to the provisions of this contract, at the point aforesaid, or altogether stop the same, without liability to answer therefor, in damages, to the said party of the second part, or his assigns: Provided, however, that the said quantity of water shall not be diminished or stopped at the point aforesaid, while water is permitted to pass at any point, dependant on the same feeder for its supply for the purpose of propelling machinery, under a water-right or contract, the commencement of the term of which is later than the aforesaid first day of July, in the year eighteen hundred and sixty-four. And in all cases of a partial or total suspension of the use of water from such cause, a pro rata deduction (in part or in full, as the case may be,) shall be made from the rent for the days during which the use of the water is so suspended.

And the said party of the first part doth further covenant and
18 agree to and with the said party of the second part and his assigns, that the said party of the first part will hereafter, if requested within twenty days after the expiration of the term aforesaid, by the said party of the second part or his assigns, renew this lease or contract for another term of twenty years, on the same terms and conditions, and subject to the same limitations as are herein contained; and so from time to time, as the said renewed lease or contract shall

expire, on the condition of the said party of the second part or his assigns, paying to the said party of the first at each renewal, a fine or bonus of one year's rent, (which fine or bonus will be on the first renewal, six hundred ($600) dollars, and on each subsequent renewal, six six hundred ($600) dollars; and, from and after renewal or reletting, as aforesaid, the rent shall be at the rate of six hundred ($600) dollars per annum.

In witness whereof The Chesapeake and Ohio Canal Company have caused their seal to be affixed, and the president of the said company has signed his name; and the party of the second part hath set his hand and seal the day and year first above written. Done in duplicate.

[L. S.] L. J. BRINGLE,
President of The Chesapeake & Ohio Canal Co., ad interim.
GEORGE HILL, JR. [SEAL.]

Signed, sealed, and delivered in presence of—

Attest:
W. S. RINGGOLD,
Clerk of Board.

19 *Answer of The Chesapeake and Ohio Canal Company to the bill of complaint of George Hill, jr., against them in chancery exhibited. Filed July 30, 1866.*

These respondents, saving and reserving all manner of exceptions to said bill for its manifold errors and imperfections, nevertheless now proceeding to answer the same, as far as advised that an answer from them is material, for answer say:

They admit that complainant is the proprietor of a paper mill in Georgetown, at the corner of Potomac and Water streets, propelled by water flowing from the canal of said respondents, but how much capital was invested therein they know not.

They admit that a certain lease was executed by them to complainant, dated the 21st of January, 1864, containing mutual stipulations whereby a certain privelege was granted to him of drawing water from their canal for the purpose of propelling the machinery of said paper mill, which privilege was to continue for a term of twenty years, from the first day of July, 1864, at an annual rent of $500 for the first
20 ten years, and $600 fo the succeeding ten years of said term, payable quarter-yearly.

They deny, however, that in said lease it was agreed that complainant should be at liberty to draw off from said canal two hundred square inches of water for the purpose aforesaid. They exhibit herewith a copy of said lease, marked Def't's Ex'b't 1, from which it appears that said complainant is expressly limited to so much water as will pass through an aperture of two hundred square inches in an iron plate, the location of which is clearly fixed by said agreement at the canal bank, and the rent of said water is fixed at $2 50 for every square inch of said aperture for the first ten years, and $3 per square inch for the second ten years, which method of leasing and which standard of charging are the same that have been in vogue with respondents for a period of twenty years; the rents upon said water leases having never been calculated upon any standard of the actual flow of water or the amount of power desired therefrom, but having been always proportioned to the number of inches through which the water is delivered from said canal,

and it is therefore wholly immaterial whether said complainant received
under said lease the full power of a volume of water two hundred
21 inches square or lost a portion of said power through friction or
other causes. Respondents also call attention to the fact that by said lease the force right of ingress and egress is reserved to the officers of respondents, to and from the premises of complainant, for the purpose of examining the fixtures and works connected with the drawing off of said water from the canal, &c.; and the right is further reserved to respondents in case the complainant shall alter or enlarge the forebray or trunk or the aperture through which said water is delivered, to stop or cut off the supply entirely.

And respondents wholly deny that complainants has complied with the provisions in said articles of agreement in said lease contained, to be done and performed on his part. To the contrary thereof, they shew that the complainant violently removed the *gague* placed in his trunk or forebray, and thereby enlarged the aperture through which the water is discharged, in direct violation of said agreement, and was thereby using an unlimited quantity of water without paying for the same, to the detriment of said canal; that in consequence thereof the
22 officers of said company were about to shut off his supply of water, as they were bound to do, when said complainant earnestly appealed to them to delay any action in the premises until the next meeting of the board of president & directors of said company, representing that his supply of water under said lease was wholly inadequate for his said mill, which request was acceded to; and that subsequently, upon representations and solicitations of complainant, said board of president & directors passed a resolution, not on the day nor in the terms stated by said complainant, but on the 10th day of May last, to the effect that the engineer & gen. sup't of the canal should ascertain as early as practicable the quantity of water required at the mill of complainant, and that if said quantity so ascertained could be permitted without detriment to the navigation of the canal, it should be granted, and a suitable *guage* to embrace the whole quantity, inclusive of the 200 inches already granted should be placed at the proper point, and a lease should be executed for such additional quantity upon the usual terms, on payment of a bonus of $3 per inch for such additional quantity; that the engineer not having acted on the premises, the
23 complainant meanwhile using said water without limit, said board of directors, on the 1st of June, 1866, passed another resolution that said engineer & gen'l superintendent should ascertain as soon as practicable the additional quantity of water required at the mill of complainant, and that a gauge suitable for such quantity, inclusive of the 200 inches now already under lease, be placed at the proper point, and that when such additional quantity should be ascertained, said complainant be required at once to pay the bonus of $5 per inch; otherwise that the water be reduced to the original 200 inches. A copy of said resolution is filed herewith, marked Def't's Ex'h't 2.

They further shew that said engineer & gen'l sup't, in pursuance of said resolution, reported the amount of water required by said complainant to be so much as would pass through an aperture of seven hundred inches square, including the two hundred inches already granted him, of which the complainant was *only* notified, and, in fact, complainant then was, and has been ever since, *been* using more than said amount of water, receiving the same through a larger aperture than
700 inches square, and therefore it became the duty of said com-
24 plainant, if he desired to avail himself of said concession and

obtain a further lease from said respondents, forthwith to pay a bonus to respondents of $5 per inch upon 500 square inches additional to his first grant. But respondents deny that said complainant was ever ready and willing to pay said stipulated bonus, as avered by him, or ever offered to pay the same, or any part thereof; on the contrary, they shew that he has always positively refused to pay the same, upon the pretext that he was not using the quantity of water charged to him; that the pretended offer in his said bill is wholly deceitful and delusive, and wholly variant from the condition of the resolutions aforesaid, being merely an offer to pay for so much water as said complainant may draw off or actually use, to be estimated accordingly to some more fanciful scheme of measurement not entering into his agreement with respondents in his original lease, or contemplated by them in the resolutions aforesaid, and not being an offer to pay according to the number of square inches through which said water is delivered by respondents from their canal, which is the usual method of payment, *in* which furnishes the only uniform
25 standard of charging, which enters into all the water leases, and was intended in the resolutions, & which offer is further wholly vague and uncertain, susceptible of various interpetations, & unaccompanied with any production of money in . Respondents shew that the resolutions were not a grant or contract, but the mere private action of the respondents without consideration, and revocable at pleasure, and did not of themselves convey any title to said complainants to said additional quantity, and that said complainant, having wholly refused to comply with the condition prescribed in said resolutions, no lease or grant for said additional water was ever made to him, & he is without title to the same, and respondents are fully entitled to restrict him to his original 200 inches, and ever to cut his supply off entirely for the time being, in consequence of his violation of the terms of said lease.

And, further answering, respondents deny the averments of said bill in regard to the resolution therein mentioned, as of the 20th of February, 1865. They shew that certain proprietors of flour mills in Georgetown who had water-leases similar to complainant's, not in any
26 manner questioning the right of respondents to locate the water-*guages* where it seemed best to them, or to charge their water-rents according to the principle *herinbefore* stated, but finding their water inadequate for the machinery, appealed to respondents to allow them additional water and locate the *guages* nearer their machinery, in order to avoid the loss of power through friction, &c., whereupon respondents refused to increase their grants of water, but a resolution was passed by the board of directors on the 23 of February, 1865, that the superintendent of the Georgetown division, under the direction of W. C. Smith, C. E., be directed to place the *guages* for the mills at Georgetown at such points as may be deemed most advisable to effect the object of the water-grants, & to limit the flow of water to the quantity to which the lesse's are severally entitled; provided, that said lesse's shall severally assent in writing, that the officers of the company may, at all times, have free access to their premises for examination or regulation of such *parts* as may be constructed upon them; and provided further, that the board may, at any time during their pleasure, if they shall deem it necessary, alter or change the position of said *guage* or
27 *guages*, or any of them, as contemplated by the leases, &c., &c., a copy of which resolution is herewith filed, marked Def't Exh't 3; that said complainant's mill was not completed at that time, and he was no party to said proceeding; that said resolutions were not passed at

his instance & request as stated by him, but at the request of the proprietors of the flour mills, as aforesaid, conveyed through an attorney employed by them for that purpose, who appeared in person before the board; that complainant never became a party to said resolutions by signing, or offering ever to sign, the written consent required by them, and consequently respondents deny that said resolution became in any sense a part of their agreement with complainant, or affected the terms of his original lease aforesaid. And even had complainant become entitled to the benefit of said resolution, the right is therein reserved to respondents to alter the location of the gauge at pleasure, and that of complainant was fixed by the officers of the company long afterwards. And respondents shew that the mills of complainant is very differently situated from the flour mills aforesaid, the latter receiving their water-
power under a four-feet head, while the machinery of the com-
28 plainant is situated some thirty feet below the surface of the
canal, and is, therefore, under entirely different conditions for the application of the water.

Respondents admit that the complainant's mill is situated at some distance from the canal, and may well admit that his loss of power through friction is considerable, though they cannot admit his statements in regard to the quantity so lost, and the quantity delivered and used. But they wholly deny that they are bound to deliver any particular quantity at the point where it is available, viz, at his machinery, or that they are entitled to charge a rent for only so much power as is there received, after making deductions for loss of power through friction or other mechanical causes. They shew that they never agreed to, or at any time proposed, anything of this kind or its equivalent, but simply consented to deliver from their canal so much water as might be needed, at a certain bonus and annual rent, for every square inch of aperture through which the same is delivered, and that the complainant, having selected his site, & constructed his works to suit his own calculations, the defendants are not bound, and have not proposed, to
29 adapt their canal and its business to his mill. They submit,
therefore, that the averments of said bill in regard to the proper admeasurement of the quantity of water actually used by him, even if correct, which they do not admit, are wholly immaterial to this controversy.

And, further answering, respondents admit that, said complainant having wholly failed & refused to comply with the conditions of said resolutions and having therefore acquired no title to any more water than his original lease allowed him, the agent of respondents, John Cameron, was directed to restore the *guage* provided for in said original lease, restricting the flow of water to so much as would pass through an aperture of 200 inches, which gauge, for the benefit of complainant, had been placed on his premises, at a short distance from the canal bank; and they shew that said complainant, in direct violation of the terms of his said lease, refused to permit said Cameron to enter his said premises for the object aforesaid, and in the most lawless and violent manner threatened to assassinate him if he should attempt to do so, which threat, as
they are informed, has been publicly reiterated in various places;
30 and that in consequence of this, and not before, said Cameron was
directed to shut off the water entirely from the complainant's premises, which is expressly permitted by the terms of the lease aforesaid.

And they further shew that their authority to sell water for milling purposes is limited to the surplus water not needed for navigation; that there is often a scarcity of water on the level at Georgetown and barely

sufficient for navigation, and they are compelled to husband the same; that it is of value, and the sale of water-right is one source of their revenues; that complainant is now using largely more than he is entitled to, without paying for it, to the detriment of respondents, and the exercise of the remedy provided therefore in the lease aforesaid is necessary for their protection.

They admit that their collector at Georgetown, supposing that complainant had come under obligations to pay for said increased amount of water, and finding him in the full use and enjoyment thereof, required him to pay the said bonus in addition to the quarterly rent aforesaid, and refused to receive the quarterly rent on the 200 inches only, and upon complainant's refusal to make said payment the said
31 Cameron was instructed to proceed as aforesaid.

And while claiming that they are entitled to act in the premises without regard to the consequences to the business of the complainant, the respondents deny that said contemplated action would work irretrievable injury to complainant which is not susceptible of compensation in damages at common law.

And wholly denying that they have threatened or design to deprive the complainant of his water-power, otherwise than in accordance with the rights reserved to them by the agreements & proceedings aforesaid, or have demanded more water-rent than complainant is liable for as aforesaid, respondents pray hence to be dismissed with their reasonable costs &c., without this, &c.

WALTER S. COX, *Sol'r.*

Attest:
W. S. RINGGOLD, [L. S.]
Clk of Board.

DISTRICT OF COLUMBIA,
County of Washington, set:

On this 28th day of July, A. D. 1866, before the subscriber, personally appeared Walter S. Ringgold, clerk of said C. & O. Canal Co., & John Cameron, and make oath on the Holy Evangely of Almighty God that the matters stated in the aforegoing answer are true; the said Cameron speaking as to the averments as to him, & said W. S. Ringgold as to the other averments in the said answer.

CHARLES WALTER, *J. P.*

[5c stamp.]

32 *Defendants Exhibit No.* 1.—*Filed July* 30, 1866.

[A certified copy of articles of agreement between the parties to this cause, and already filed by complainant as Exhibit to the original bill and marked "G. H. Jr., No. 1." See page 9 of this transcript.—CLERK.]

33 *Defendants Exhibit* 2.—*Resolution and order of the Ches. & Ohio Canal Co.*—*Filed July* 30, 1866.

The following resolution was adopted by the board on the 10th of May, 1866:

Resolved, That the engineer & gen'l superintendent of the canal be directed to ascertain as early as practicable the quantity of water required at the mill of George Hill jr., and when ascertained, if the allowance of said quantity can be permitted without detriment to the navigation of the canal, that such additional quantity be granted, and that a suitable guage to embrace the whole quantity (inclusive of 200 inches now leased)

be prepared and placed at the proper point, and that a lease be executed for such additional quantity of water-power upon the usual terms, on payment of a bonus of $5 per inch for such additional quantity of water-power.

On the 1st day of June, 1866, the board

Ordered, That the engineer & gen'l sup't of the canal be directed
34 to ascertain as soon as practicable the additional quantity of water required at the mill of George Hill, jr., and that a suitable *guage* for such additional quantity, inclusive of 200 inches now under lease, be placed at the proper point and when such additional quantity be ascertained, that said Hill be required at once to pay the bonus of $5 per inch; otherwise that the water be reduced to the original 200 inches.

OFFICE CHES. & OHIO CAN' C. *C.*
Washington, July 25, 1866.

I certify the foregoing to be true copies from the minutes of proceedings of the president & directors of the Chesapeake & Ohio Canal Company.

W. S. RINGGOLD,
Clerk & Treasurer.

35 *Defendant's Exhibit No. 3.—Resolution of the Ches. & O. Canal Company.—Filed July* 30, 1866.

At a meeting of the president & directors of the Chesapeake & Ohio Canal Company, on the 23rd of February, 1865, the following resolution was adopted:

Resolved, That the superintendent of the Georgetown division, under the direction of W. C. Smith, C. E., be directed to place the water-*guages* for the mills at Georgetown, at such points as may be deemed most advisable to effect the object of the respective water-grants, and to limit the flow of water to the quantity to which the lessees are severally entitled: *Provided*, That said lessees shall severally assent in writing that the officers of the company may, at all times, have free access to their premises, for examination or regulation of such parts as may be constructed upon them: *And provided further*, That the board may, at any time, during their pleasure, if they shall deem it necesaary, alter or change the position of such *guage* or *guages*, or any of them, as contemplated by the lease, and that this resolution shall not, in any other manner, change or impair the provisions or requirements of the respective leases granted to said parties.

Attest:
(Signed) W. S. RINGGOLD,
Cl'k & Treas.

36 We, the undersigned, holding water-leases from the Chesapeake & Ohio Canal Company, do hereby assent to the provisions of the aforegoing resolutions, and request that the water-*guages* be placed upon our respective premises, at or near the water wheel.

February, 1865.
(Signed) GEO. SHOMAKER & CO.
A. ROSS RAY & BRO.
HERR & WELCH.
D. L. SHOMAKER & BRO.
W. YOUNG.
JOHN DAVIDSON.

OFFICE CHES. & OHIO CANAL CO.,
Washington, July 25, 1866.

I certify that the aforegoing is a true copy from the minutes of proceedings of the president & directors of the Chesapeake & Ohio Canal Company of the 23rd of February, 1865, and of a paper on file in this office.

W. S. RINGGOLD,
Clerk & Treasurer.

37 *Order continuing cause to Sept. term*, 1866.—*Filed July* 31, 1866.

GEO. HILL, JR.,
vs.
CHES. & O. CANAL CO.

AT CHAMBERS, *this* 31*st day of July*, 1866.

Ordered, That the motion for an injunction in this cause be continued to the first Tuesday of September next. Ordered, That the complainant give adequate security to the defendants to answer all damages occasioned by the delay.

ANDREW WYLIE.

38 *Bond for injunction.—Filed Aug.* 6*th*, 1866.

Know all men by these presents that we, George Hill, jr., and John Berry, are held and firmly bound unto The Chesapeake & Ohio Canal Company in the sum of three thousand dollars, current money, which sum is to be paid to said Chesapeake and Ohio Canal Company, their certain agent or attorney; to *the* which payment we bind ourselves, jointly and severally, our and each of our heirs, by these presents, sealed with our seals and dated this 31st day of July, A. D. 1866.

Whereas in a certain cause depending in equity in the supreme court of the District of Columbia, an order was passed at chambers by Hon. Andrew Wylie, justice, on the said 31st day of July, A. D. 1866, ordering that the motion for an injunction in said cause (wherein the said George Hill, jr., is complainant, and the said Chesapeake & Ohio Canal Company the defendant,) be continued until the first Tuesday of September, A. D. 1866, provided the complainant furnish adequate security to answer all costs and damages which the defendants may incur
39 by reason of the delay occasioned by such continuance.

Now the condition of this obligation is such, that if the said George Hill, jr., doth and shall well and truly pay and satisfy to said defendants all costs and damages suffered by them, by reason of the premises aforesaid, then the above obligation shall be null, void, and of no effect; otherwise shall be and remain in full force and virtue in law.

GEORGE HILL, JR. [SEAL.]
JOHN BERRY. [SEAL.]

Signed, sealed, & delivered in presence of—
GEO. W. BEALL.

40 *Complainant's petition for rule, &c.—Filed Aug.* 20, 1866.

To the honorable the justices of the supreme court of the District of Columbia, sitting in equity:

Your petitioner, George Hill, jr., respectfully sheweth unto your honors:

That, on or about the day of July, 1866, your petitioner filed in this honorable court his certain bill in equity, praying the issuance of the special writ of injunction against The Chesapeake & Ohio Canal Company, enjoining & restraining the said Chesapeake & Ohio Canal Company from cutting off or diminishing the supply of water flowing from their canal to petitioner's mill & factory at Georgetown, in the District of Columbia. That thereupon, to wit, on the said day of July, 1866, the said Chesapeake & Ohio Canal Company, having previously received notice of your petitioner's intention to file his said bill, voluntarily appeared at chambers, before his honor Andrew Wylie, associate justice, by their solicitor, Walter S. Cox, esquire, & filed their answer to your petitioner's said bill, and thereupon consideration of the motion for injunction was had by his honor Justice Wylie, & upon the suggestion
41 that the board of directors of the said Chesapeake & Ohio Canal Company would hold session during the present month of August, at which it was expected the matters in controversy between your petitioner & the said company would be amicably adjusted, his honor *defended* the final disposition of the said motion for injunction, & passed an order, which order was drawn up & prepared by the aforesaid solicitor for said company and in his handwriting, continuing said motion until the first Tuesday of September, 1866, provided your petitioner should give bond, with adequate security, to answer any costs or damages which may accrue or be occasioned by reason of the delay.

Your petitioner further sheweth to your honors, that he, on his part, hath fully complied with this said order by giving the required security, all of which will fully appear by reference to the record proceedings in said cause, which your petitioner prays he may have leave to produce & read as part hereof.

Your petitioner further sheweth that, on or about the 16th day of August, your petitioner learned that it was the intention of the said company
42 to cut off or diminish the supply of water flowing to your petitioner's mill, & thereupon, & in order that the said company could be in error as to the purport of the aforesaid order & the present attitude of the cause, procured a certified copy of said order & the certificate of the clerk of the court, certifying that your petitioner had complied with the said order by giving the security required thereby, & caused the same, on the 17th day of August, 1866, to be delivered to William S. Ringgold, the clerk and treasurer of said company, & charged with the superintendence of the company's canal & affairs in the District of Columbia.

But your petitioner respectfully sheweth that, notwithstanding the premises, the said William S. Ringgold, acting as the officer & agent of said company, hath ordered one John Cameron, another agent & officer of said company, to change & reduce the supply of water flowing to your petitioner's said mill; and the said John Cameron in execution of said order of said Ringgold, did, on the 18th day of August, 1866, while your petitioner was absent from his said mill, change & reduce the supply of water aforesaid by placing at the canal trunk a g*uag*e whereby the supply of water to your petitioner's mill is reduced below the quantity which your petitioner is entitled to have of said company
43 under and by existing agreement between your petitioner & said company, which acts & doings, on the part of the above-named officers of said company, your petitioner insists are a palpable violation of the intent & meaning & the order prepared by their own solicitor & approved of by his honor Justice Wylie as aforesaid; & your petitioner avers that the said agents, in thus acting in the premises,

have been guilty of & now are in contempt of the lawful authority of this honorable court.

Your petitioner therefore prays that a rule may be lain on this said William S. Ringgold & John Cameron, commanding them by a certain day & upon certain pain to appear before your honors to shew cause, if any they have, why an attachment should not issue against them for contempt of the lawful authority of this court.

Am as in duty, &c.

GEORGE HILL, JR.

JONES & ASHFORD,
Sol'rs for Comp't.

DISTRICT OF COLUMBIA,
County of Washington:

On this 20th day of August, A. D. 1866, before the subscriber,
44 a justice of the peace in and for the county and district aforesaid,
personally appeared George Hill, jr., & under oath in due form of
law that matters & things stated in the foregoing petition are true,
to the best of his knowledge & belief.

N. H. MILLER, *J. Peace.* [SEAL.]

45 *Order to issue rule.—Filed Aug.* 20, 1870.

The motion is granted, and rule directed to be entered as prayed, returnable before me at chambers on 21st instant, at 12 o'clock m.

ANDREW WYLIE.

Rule to show cause.—Issued Aug. 20, 1866.

In the supreme court of the District of Columbia, Aug. 20, 1866.

GEORGE HILL, JR.,
vs.
CHESAPEAKE & OHIO CANAL CO. } 739. Equity docket 8.

For reasons set forth in a petition filed this day in said by the complainant, you are hereby commanded to appear in said court on the 21st inst., at 12 o'clock m., and show cause, if any you have, why an attachment for contempt of the authority of this court should not issue against you.

By order of the court.

Test:

[L. S.]

R. J. MEIGS, *Clerk, &c.*

Marshal's return on rule.—Returned Aug. 21, 1866.

Served Aug. 21, '66.

DAVID S. GOODING,
U. S. Marshal,
Per JA'S R. O'BEIRNE,
U. S. Dep. Mar. D. C.

AUG. 21, '66.

46 *Order discharging rule.—Filed Aug.* 21, 1866.

Ordered, at chambers, this 21st day of August, 1866, that the rule

on certain officers and agents of defendant, to show cause why an attachment for contempt should not be issued against them, granted on the 20th inst., be, and the same is hereby, discharged.

ANDREW WYLIE, *Justice.*

47 *Amended Bill.—Filed Sept.* 18, 1866.

In the supreme court of the District of Columbia.

GEORGE HILL, JR., *vs.* CHES. & OHIO CANAL COMPANY. } No. 739. Equity doc. 8.

To the honorable the justices of the supreme court of the District of Columbia:

The amended bill of complaint of George Hill, complainant against said defendants, exhibited by leave of court in that behalf first had & obtained, respectfully sheweth:

That the provision of the aforesaid resolution of the board of directors of said canal company of May, 1866, were by the company required to be accepted by complainant in writing, and were accepted in writing by complainant, and the written acceptance thereof, (as complainant is informed, was, by W. D. Davidge, complainant's solicitor, delivered to Ring'old, treasurer & secretary of said defendents, and com-

48 plainant requires of the defendants the production here in court of said written acceptance, in connection with his answer hereto.

Your orator further sheweth and avers that said resolutions of May, 1866, as accepted by complainant, was intended & operated as an enlargement of the original contract & lease between defendants & your orator, of date January, 186 , in respect to the quantity of water to be furnished by defendants, and to be used & enjoyed by your orator, in that it provides for an additional quantity of water, to be measured in the mode prescribed in said original contract.

Yet, notwithstanding it was the purpose & object of said resolution, as the same was accepted & acted upon by your orator, to enlarge the said contract in respect to the quantity of water to be used & enjoyed by your orator, to be measured according to the terms of said contract, said defendants are seeking to charge your orator, for such additional quantity of water as he has used under the provisions of said

49 resolutions, by a rate & measurement never contemplated in said original contract; but defendants, by enlargeing the aperture at the canal bank, at the upper or top line thereof, without enlargeing, in a cor'esponding degree, the width or length thereof, as was done & practised by the defendants' engineer in ascertaining the quantity with which they seek to charge your orator, said defendants diminish the pressure of the water at the aperture, & thereby proportionately diminish the amount of power received by your orator.

Your orator further shews & charges that, in entering into & making the original contract between the defendants & your orator, the chief & only object & intention of the parties thereto was to furnish & acquire the motive power necessary to the operating of complainant's mill, & such being the object of said contract, & the intention of the parties thereto, your orator submits that a just and equitable construction & int*e*rpretation of said contract would require that defendants,

50 in ascertaining the measurement of the water with which they seek to charge your orator, should have enlarged the aperture

aperture at the canal bank in greater proportion in the length thereof than in the h'ig'th thereof. And your orator avers & charges that, if such a mode of measurement had been adopted & practised by defendants' engineer in ascertaining the quantity of water with which your orator should be charged, all which could have been done & could be done without detriment to the navigation of said canal, & without injury to defendants, your orator could not be justly charg'able with anything like the quantity of water with which defendants seek to charge him.

Your orator further says & states to the court that he has always been ready & willing & now here tenders himself ready & willing to pay to the defendants the rent & bonus upon so much water as
51 your orator has used, if measured according to the intent & spirit of the aforesaid contract as extended & enlarged upon by said resolution of May, 1866, accepted and acted upon by your orator aforesaid, and has always been ready & is now willing & ready to execute on his part a lease for the same, & if in judgment of this honorable court, the measurement of said water made by the engineer as aforesaid & insisted on by defendants be conclusive upon your orator, he prays that upon payment by him to said defendants of the same & amount insisted on & claimed by them, & upon executing on his part a lease as required by said resolution, said defendants may be enjoined as prayed in your orator's bill of complaint.

And as in duty, &c., &c.

GEORGE HILL, JR.

DAVIDGE, & JONES & ASHFORD,
For Comp't.

52 DISTRICT OF COLUMBIA,
County of Washington, ss:

This 18th of September, 1866, came George Hill, jr., & made oath in due form of law, that the matter' stated in the foregoing bill are true to the best of his knowledge & belief.

Subscribed & sworn to before—

N. H. MILLER, *J. P.*

53 *Defendant's answer to am'd bill.—Filed Sept.* 18, 1866.

Answer of The Chesapeake and Ohio Canal Company to the amended bill of complaint of George Hill, jr.

These respondents, saving, &c., for answer to amended bill, say—

That the said resolution of May, 1866, contemplated further action, as appears by its terms, before any contract or grant should be entered into with the complainant, and was not intended as a proposal to be accepted by said complainant, nor was there any direction or order given by the board of directors of the said company to communicate the same to complainant, or require his acceptance thereof; but respondents admit that the officers of said company, apprehending that some further pretext might be resorted to by complainant for his unauthorised proceedings, and that the time & trouble of carrying said resolution into effect might be wasted, did, on their own responsibility, require said Hill to accept and agree to the terms of said resolution, in writing,
54 in order that there might be no room for controversy thereafter, and accordingly the complainant, by his counsel, did present at the office of said respondents a paper, of which a copy is herewith exhibited, marked Defendant's Exhibit 4.

Deft's Exhibit "4."

WASHINGTON, *May* 21, 1866.

I hereby agree to take ~~as pay~~ for the additional quantity of water requisite for my mill according to the terms and conditions of the resolution of the board of The Chesapeake Ohio Canal Co., passed on 10, instant.

(Signed) GEORGE HILL, JR.

I certify the above to be a true copy of a paper on file in the office of the Ches. & Ohio Canal Co.

W. S. RING'OLD, *Cl'k & Tr.*

Respondents wholly deny that said proceedings amounted, in law, to a contract, binding them to make an additional grant of water; but, supposing such to be the legal effect thereof, they further shew and submit that such contract was conditioned on the payment of a bo-
55 nus, as required in said resolution, and that complainant wholly refused to comply with said condition, and thereupon the respondents became entitled either to enforce said contract or wholly to rescind the same at their election; that, in fact, before any proceedings were had or steps taken to carry said resolution into effect, said respondents elected in advance to rescind any such supposed agreement, in case of complainant's failure to comply with the condition aforesaid by their resolution of June 1st last, which directed, in such contingency, that complainant be restricted to the quantity of water given by his original lease; and as a further and more solemn rescission of any such supposed agreement, said board of directors, on the 9th of August last, passed certain other resolutions, a copy whereof is filed herewith marked D'f't's Exh't 5.

Defendant's Exhibit "5."

At a meeting of the president and directors of the Chesapeake
56 & Ohio Canal Co., held August 9th, 1866, the following proceedings were had:

Whereas George Hill, jr., having refused to comply with the terms of the resolutions of the board of the 10th of May and 1*th* of June last, granting him additional water-power at his mill in Georgetown, and having otherwise acted in a violent & arbitrary manner; resolved that the resolutions heretofore passed by this board, in favor of George Hill, jr., on the 10th of May and 1*th* of June respectively, be, and they are hereby, repealed, and that the board decline to grant to said Hill any water-power additional to that granted by his lease of January, 21*th* 1864, and that the superintendent be, and he is hereby, directed to restore the gauge of *of* two hundred inches, and should he be prevented from doing so, to cut off the supply of water entirely from the mill of said Hill.

Attest: W. S. RINGGOLD,
Cl'k & Treas.

[5-ct. stamp.]

Wherefore respondents claim that complainant is not entitled
57 in law or equity to any quantity of water beyond that conveyed by his first lease.

Respondents further show that when complainant's want of additional water was first made known to them, it was not imagined that more than one or two hundred additional inches would be required, or the application would not have been entertained; that the quantity actually found to be necessary cannot conveniently be spared from the canal, and they are constrained by the increasing exigencies of navigation to refuse any additional grant of water to which they are not committed by a complete and binding contract.

And, further answering, respondents shew that complainant made application for an additional quantity of water. He did not ask to have the same delivered through any other forebay than the one constructed by him, or to have his said forebay enlarged, either of which would have been impos'ible without great expense to complainant; that
58 at the time of his said application, complainant was, in fact, using said increased supply of water through the same forebay, and his application was, in effect, to be allowed to continue so to use it; that he could acquire no such right except in the terms and on the conditions prescribed by respondents; that their consent was given with reference to existing circumstances, and the spirit and meaning of the application; that th*ere* consent therefore, and any contract resulting therefrom, *was* for the delivery of additional water through said forebay; that said water was to be granted on the usual terms; that is, at the same rate of renting prescribed in complainant's former lease, which rate was established with reference to the number of square inches through which the water is delivered.

And they further shew that such being the contract, if any, there was no other method of enlarging the original aperture through which said water should be delivered, which was already of the entire width of said forebay, than to enlarge it upwards, the said complainant having constructed his forebay of such solid materials that it could not be altered & laterally enlarged without great expense to him, and
59 perhaps without changing the machinery of his mill to which it was adapted; that complainant himself had so enlarged the aperture upwards, and was using the water through the same so enlarged at the time of the application; that his foreman was present assisting the engineer of respondents in the experiment of ascertaining the requisite quantity to be delivered by such enlargement of the aperture, and complainant therefore fully understood, when he assented to said resolution, that it contemplated no other mode of delivering the water than that actually practised and of which he has availed himself without objection. They submit therefore that the contract, if any, was to pay at the rate and in the manner claimed by respondents, and was not a contract to charge for a less number of inches than is actually used, which in a different shape, would give an equivalent power; that no such contract was ever entered into by respondents with any person, and consequently could not have been contemplated by a reference to the usual terms of leasing in said resolution.

They submit that the obligations of complainant, under the
60 alleged contract aforesaid, are in no wise affected by the form in which the flow of water is received by him; that no lease could be made which would not be open to the same objection now made, and that the complainant receiving and using the water through an aperture of his own construction, upon terms well defined and understood, no question about equivalent powers is at all relevant or can be introduced into the contract without an utter perversion of the terms and spirit thereof.

Respondents wholly deny that the said alleged contract, as averred in said amended bill, would require respondents in making the measurement aforesaid, to enlarge the aperture in greater proportion in the length than in the height thereof. They shew that said aperture was the entrance to complainant' forebay, constructed and owned by him, over which respondents had no control, which they had no right to enlarge, & which complainant neither offered nor asked to have enlarged; that had he desired to enlarge the same, a wholly different question would have arisen, and possibly a different understanding might have been had; but they wholly deny that while said
61 complainant has been receiving said water under one contract, and in a form chosen by himself, he is only chargeable under a contract which he might have made under other circumstances more advantageous than the alleged subsisting one.

Respondent cannot admit that said latteral enlargement would not be detrimental to their canal.

And reiterating their denial that complainant was ever ready and willing, or offered to pay according to the terms and meaning of the resolution aforesaid, respondent prays to be hence dismissed, &c., without this, &c.

WALTER S. COX, *Sol'r.*

Attest: W. S. RINGGOLD,
Cl'k & Treas.

On this 18th day of Sept'r, A. D. 1866, before the subscriber, personally appears W. S. Ringgold and makes oath on the Holy Evangely &c., that the matters stated in the aforegoing answer are true, to the best of his knowledge and belief.

CHA'S WALTER, *J. P.*

62 *Order granting injunction on payment, &c.—Filed Sept.* 19, 1866.

The motion for a special injunction in this cause having been argued by counsel, and consideration being had, it is this 19th day of September, A. D. 1866, by the court ordered that the special injunction issue as prayed—provided the complainant shall, on or before Monday the 24th instant, pay into court the amount of rent and bonus claimed by defendants as appears by the record of proceedings, to wit, the sum of two thousand eight hundred & sixteen $\frac{67}{100}$ dollars to abide the further order of the court in the premises.

GEORGE P. FISHER,
Jus. S. C. D. C.

Injunction.—Issued Sept. 27, 1866.

The President of the United States, *gr.*, to the defendant greeting:

For causes and reasons set forth and shown in the bill filed in this cause, you are hereby enjoined and strictly prohibited and restrained from molesting interrupting, or diminishing the supply of water to your orator's paper mill in Georgetown. Hereof fail not under pain of attachment and such other process of contempt as may be issued by the court against you.

D. K. CARTTER,
Chief Justice, &c.
R. J. MEIGS, *Clerk.*

Marshal's return.—Sept. 27, 1866.

Served copy of the within injunction on Ringgold, clerk to the company.

D. S. GOODING,
Marshal.

SEPT. 27, 1866.

63 *Replication.—Filed Oct. 9, 1870.*

GEORGE HILL, JR. *vs.* CHES. & OHIO CANAL CO. } No. 739.—Equity.

The complainant hereby joins issue with the defendants & will hear the cause upon bill, answer, & exhibits, & such evidence as may be adduced in the cause.

JONES & ASHFORD,
For Compl't.

64 DEFENDANT'S TESTIMONY.

Deposition of Charles P. Manning.—Filed Feb'y, 1867.

To interrogatory 1st. My name is Charles P. Manning; my age is 49 years; and occupation that of civil engineer.

To interrogatory 2nd. I was in the employ of said company as engineer and general superintendent from January 1st, 1866, to October 1st, 1866.

To interrogatory 3rd. I know of such controversy.

To interrogatory 4th. I did take steps to ascertain the number of square inches of water delivered at the canal bank, that were required for the full operation of the paper mill of the said Hill, in the summer of 1866, and it required at that point seven hundred square inches. This result was obtained by causing the head-gate, which occupied the full width of the complainant's forebay at the canal bank, to be carefully raised, so as gradually to enlarge the aperture for admitting water from a size declared by the complainant to be wholly insufficient for his purposes up to the dimensions required by him, (or his agent and foreman, then in charge of the mill,) as sufficient only for the com-

65 plete working of all his machinery.

To the second 4th interrogatory. I do not know through what size of aperture the complainant's said mill is now supplied; but I know, from personal inspection and accurate measurement, that during the experiment which I caused to be made, and which resulted as before given in my response to previous interrogatory number four, that the aperture through which the mill was then supplied was of the full width practically admissible within the limits of the stone culvert built by said complainant as a forebay to his mill; and that the dimensions of the aperture demanded for the uses of said mill by the foreman thereof were 42 inches in width by 17½ inches in height; equal in area to 735 square inches.

To interrogatory 6th. At the time referred to, that is to say, in the summer of 1866, the peculiar and striking difference then existing between the mill of said complainant and the flour mills in Georgetown, supplied with water-power from the waters of the Chesapeake and Ohio

Canal, consisted in the use of "turbine" wheels in the former, and ordinary overshot wheels in the latter; which difference in the wheels of said mills, made it necessary that the *guage* of the former
66 should be located at the canal bank.

To interrogatory 7th. I do not now call to mind anything of special interest to the parties at issue in the cause, beyond my knowledge of the facts that, during several months of the spring and summer of 1866, the said complainant had an ungauged and unrestricted supply of water from the trough of the Chespeake and Ohio Canal for the most complete and thorough operation of the machinery of his said paper mill in Georgetown. And that the full dimensions of the aperture in the "bulkhead" of the "forebay" when the supply of water to the mill was turned on or off, at the pleasure of the complainant or his foreman, were 42 (forty-two) inches wide, by 24 inches high; with the bottom of said aperture at an elevation of only 20 inches above the bottom of the canal, instead of 24 inches above it as prescribed by the terms of his lease.

CHA. P. MANNING.

67 In the supreme court of the District of Columbia.

Order for paym't of quarterly instalments.—Filed Feb'y 16, 1870.

GEO. HILL JR., *vs.* THE CHES. & OHIO CANAL CO. } 739. Equity.

It is further ordered in this cause, by consent of counsel, the 16th day of February, A. D. 1867, that the complainant do pay unto court, on or before the 20th inst., the quarterly instalments of water rent accrued and fallen due to defendants, according to their claims & pretensions as set forth in the pleadings on the first days of October and January last, amounting to the sum of eight hundred and seventy-five dollars, and that in default thereof the injunction heretofore issued in this cause be dissolved.

It is further ordered that, until the further order of this court in the premises, the complainants do continue to pay into court said quarterly instalments, and that on his failure at any time so to do, said injunction shall be dissolved.

A. B. OLIN.

68 COMPLAINANT'S TESTIMONY.

Deposition of J. E. Stevenson.—Filed June 4, 1867.

I reside in the city of New York; and age, 44 years; I am, by occupation, a hydraulic and mechanical engineer; I am constantly engaged in the practice of my profession; I know George Hill, jr., the complainant in this suit. I have recently examined George Hill's paper mill, Georgetown, and particularly the machinery connected with it; and also the aperture, forebay, or *floom* leading from Chesapeake and Ohio Canal to said mill. Two hundred inches of water under a four-feet head, as is ordinarily understood by mill'rights and men that want to build, would afford sufficient power under a thirty-feet head, to run Mr. Hill's mills with this machinery. I do not consider the manner in which the water is now measured, seven hundred square inches, is a proper or

fair manner of measuring the water. In this case Mr. Hill is
69 charged, paying for seven hundred square inches of water; he pays for more than double the quantity that is required to run his mill. In the Eastern States, I do not know any case in which the water is measured through a *guage*, as this company measures in this present case. There is a loss in this case, measuring in the manner in which this company measures, thirty-eight one-hundredths of the whole, as generally understood.

Cross-examined:

In answer to 1st cross-interrogatory, he saith: The difference is, I should estimate or measure by the cubic feet either in the *floom* above or tail-race below.

In answer to the 2nd cross-interrogatory, he saith: Patterson is the only place that I know of that measures water in the same manner as this company. They have compromised the matter with some of the mills that require it, and measure by the cubic feet.

In answer to the 3rd interrogatory, he saith: I do not. He is drawing it under a five-inch head from the surface when it ought to
70 measure four feet from the centre of the opening to the surface in the canal.

Re-direct by Mr. Ashford:

The Dundee Manufacturing Co., at Passaic, New Jersey, rent their water under a three-feet head by the square feet, drawn through a similar *guage*, as the one used by the Chesapeake and Ohio Canal Co., but they state in their leases the number of cubic feet of water that *guage* will supply. The distance of the canal from Mr. Hill's mill is between 350 & 400 feet. Putting a *guage* in at the canal the seize of 200 square inches, would destroy the effect or fo'ce of the motive power, and it would be impossible to run his mill with the amount of water that he would get through that *guage*. There is some difference in favor of placing the *guage* near the wheel.

(A paper is herewith filed and marked Exhibit G. H., No. 1, which shows the result of the calculations.)

J. E. STEVENSON.

71 *Exhibit G. H., No.* 1, *to deposition of J. E. Stevenson.—Filed June* 4, 1867.

GEORGETOWN, D. C., *May* 10*th*, 1867.

Calculations of the discharge of water from two turbine wheels in the paper mill of Mr. Geo. Hill, in Georgetown, D. C.

Head of water, 30 feet.

Measurement of all the discharge openings of 30-inch turbine is 86 sq'r. inches.

Actual discharge, when running full power, is 68.82 sq'r. inches, equal to 20.95 cubic feet per second, or 57.15 horse-power.

Measurement of all the discharge openings of 14-inch turbine is 17.20 sq'r. inches.

Actual discharge, when running full power, is 13.76 sq'r. inches, equal to 4.19 cubic feet per second, or 11.43 horse-power; total for both wheels, 25.14 cubic feet per second, or 68.58 horse-power.

200 square inches of water, drawn theoretically under a 4-feet head, will be equal to 73.04 sq'r. inches under a 30-feet head. Thus, $\frac{200 \times 16}{43.81}$ = 73.04 sq'r. in. = 60.66 horse-power.

The coefficient of discharge by a rectangular *guage* (as through a thin plate under a 4-feet head) is .62 per cent., consequently

72 $200 \times \frac{62 \times 16}{43.81} = 45.28$ sq'r. in. $= 37.60$ horse-power; 700 sq'r. inches of water, drawn theoretically under a four-feet head, is equal to 255.64 sq'r. inches under a 30-feet head; and, using the coefficient .62, applicable to a *guage* under a 4-feet head, as before, reduces the amount to 158.49 sq'r. inches under a 30-feet head, or double the amount of water necessary to run the mill.

Thus, $\frac{700 \times 16 \times 62}{43.81} = 158.50$ sq'r. inches.

73 DEFENDANT'S TESTIMONY.

Deposition of Walter S. Ringgold.

I am clerk and treasurer of The Chesapeake & Ohio Canal Company, and have held the office for 20 years last December, and I am the executive officer.

Looks at defendant's exhibit, marked No. 1, and says: "That is the usual form of leasing in Georgetown, D. C., by that company; to my knowledge there has never been any other form of leasing. The company have never leased water by the cubic foot or charged rents according to the number of cubic feet or the quantity of water delivered, however measured, or otherwise than according to the size of the aperture through which the water is delivered from the canal. There are two classes of leases. The first class amount to eleven hundred & seventy-five inches, which has existed more than 20 years, and the present rate on those leases is three dollars per inch per annum. In

74 April, 1855, the board determined to lease an additional quantity of twelve hundred inches on payment of a bonus of five dollars per inch, and an annual rent, for the first ten years, of $2 50 per inch per annum; and for the second ten years $3 00 per inch per annum, with privilege of the renewal of 20 years on payment of one year's rent, at three dollars per inch as a bonus, and the rent to continue at the rate of three dollars per inch per annum. On these terms all leases have been made since 1855. By the number of inches is meant the number of inches of the aperture.

The quantity of water leased to the millers of Georgetown are as follows:

A. H. Herr	300	inches	$3 00
J. S. Welch	500	"	3 00
J. Davidson	50	"	3
G. Shoemaker & Co.	125	"	3
A. R. Ray	100	"	3
D. L. Shoemaker	100	"	3
J. Davidson	200	"	2½
G. Waters	200	"	"
P. R. Ray	400	"	"
D. L. Shoemaker	200	"	"
Gallant & Cassel	50	"	"
Abner & Brady	150	"	"

W. S. RINGGOLD.

75 *Order.—Clerk S. C. D. C. to pay def'ts, &c.—Filed July* 13, 1867.

It is this 13th day of July, A. D. 1867, ordered that the clerk pay to the defendant, out of the fund deposited by the complainant, the sum of one thousand dollars.

By order of the court.

Receipt to clerk for payment, &c.—Filed July 13, 1867.

Received one thousand dollars, in obedience to above order.

W. S. COX,
Sol'r for Def't.

76 *Order appointing special commissioner, &c.—Filed Aug.* 1, 1867.

In this cause it is this 1st day of August, A. D. 1867, ordered that W. R. Hutton be, and he is hereby, appointed a special commissioner to inquire and make report to this court upon the following questions, viz:

1. What volume of water is ordinarily received into the forebay of complainant's mill, when the same is in operation, from the Ches. & Ohio Canal, and through how many square inches of aperture.

2. What quantity of water is discharged from said mill in any given time, through its tail-race, and especially in comparison with other mills at Georgetown.

3. How many square inches of aperture, situated at the distance of two feet from the bottom of the canal, and of the width of complainant's forebay, would furnish a flow of water equivalent in power and effect to the additional water received by the complainant, under the resolutions of May and June, 1866, exhibited in this cause, over and above his original grant.

4. Upon any other matter calculated, in his judgment, to throw
77 light upon the subject of this controversy.

It is further ordered that either party have leave to take further testimony before October special term next of this court.

By order of this court.

Report of Special Commissioner Hutton.—Filed Oct. 1, 1867.

Answers to the questions proposed in the order.

To question 1. Twenty-three (23) cubic feet of water per second, through an aperture of 1,008 square inches, the gate being entirely removed.

To question 2. Twenty-three cubic feet per second, besides a small quantity received from the Potomac Water Works, which could not be measured. The other mills discharge through their tail-races about $6\frac{3}{8}$ cubic feet per second for each one hundred inches of aperture, varying somewhat with the circumstances of each mill.

To question 3. The question is indeterminate. It is first nec-
78 essary to ascertain how much water was originally granted, and this is a matter of interpretation of the contract, and to be decided by the court.

1st. Either the complainant is entitled to as much water as will pass through the aperture, formed and situated as described, under any circumstances or—

2nd. To only so much as will pass through it under the conditions of this particular case. Answers are given on both suppositions.

When water flows through an opening and discharges freely in the air, a greater quantity passes than when it is impeded by a greater or less height of back water.

Overshot-wheels, as are most of those in the Georgetown mills, require the water to come on them with a free fall, and therefore when the *guage* is placed at the wheels the miller has the benefit of the whole head and fall from the canal to the river, and the canal loses no more water than it agrees to furnish. In the complainant's mill tur-
79 bines are used, placed 30 feet lower canal surface, and arranged to do their work under that head. Any diminution of head causes a loss of velocity and of power.

It is not possible while his works are arranged as at present, for complainant to receive through any given aperture as much water as is received by an overshot-wheel through the same.

1st. If he is entitled to as much water as would be received at the other mills in Georgetown through the same aperture. The quantity authorized by resolutions of May & June referred to, is 9 cubic feet per second, which will require an aperture, as described in the 3d interrogatory, of one hundred & thirty-five square inches. But the whole quantity of 23 cubic feet will require an opening of 345 sq. inches.

2nd. In case he is entitled to draw only so much as will pass through an aperture of 200 square inches in the particular circumstances of his mill, then an aperture of 200 square inches will supply eleven cubic feet at a very much diminished head, and the additional quantity
80 or 12 cubic feet, will require an opening of 217 square inches; but, owing to the narrowness of the forebay and the necessity to keep up the head, the whole quantity required cannot be obtained through an opening less than about 700 square inches without loss of power and effect.

4th. As information that may be useful, the whole quantity of water taken from the canal to run complainant's mill, at its ordinary capacity, is equal to 345 square inches of aperture, as measured on the overshot-wheel, if said aperture is made the full width of the complainants' forebay, and 352 inches if made the width of the present gate in his forebay.

NOTE.—In consequence of difficulty of access and the absence of conditions to a correct measurement of the water flowing in the tail-races, it was obtained from the quantity flowing into them from the wheel, a method easier of determination and more accurate in its results.

W'M R. HUTTON,
Commissioner.

81 *Order certifying cause to court in banc.—Filed Oct.* 10, 1867.

GEO. HILL
vs. } 739. Eq. do. 8.
CHES. & OHIO CANAL CO.

On motion, &c., with consent of counsel on both sides, it is, this tenth day of October, A. D. 1867, ordered that this cause be certified to this court in gen'l term.

By order of the court.

82 In the supreme court of the Dist. of Columbia, sitting in general term.

Final decree.—Filed Jan'y 28, 1868.

GEORGE HILL
vs.
THE CHES. & OHIO CANAL CO. } No. 739. Eq. doc. 8.

This cause coming on to be finally heard, and having been heard and submitted, it is, by the court, this 28th day of January, A. D. 1868, ordered, adjudged, and decreed, that the injunction heretofore issued in this cause be, and the same is hereby, made perpetual for the period of complainant's lease, as to so much of the water drawn from the canal of defendants by the complainant, as will pass through an aperture of seven hundred square inches into the forebay at present in use by said complainant, and so long as said complainant retains his present machinery and shall make no change therein whereby the quantity of said water shall increased; provided, that said complainant shall forthwith pay to said defendants the sum of one thousand and eighty-five dollars, as a bonus upon two hundred and seventeen additional square inches, and the sum of sixteen hundred and eighty-eight $\frac{72}{100}$ dollars as
83 the arrears of rent due said defendants on four hundred and seventeen square inches to the 31st of December last, and shall continue to pay said rent quarterly on said [redacted] inches, according to the terms of his original lease filed in this cause.

By order of the court.

D. K. CARTTER.

Appeal to Sup. C't of the U. S., taken in general term.—Filed Oct. 27, 1870.

The defendant, by its solicitor, W. S. Cox, prays an appeal from the decree of this court of January 28, 1868, to the Supreme Court of the United States, and the same is allowed, and its bond for the prosecution of the same is approved.

By the court.

84 *Appeal bond to S. C. U. S.—Filed Oct. 27, 1870.*

Know all men by these presents that The Chesapeake and Ohio Canal Company and William W. Corcoran are held and firmly bound unto George Hill in the sum of five hundred dollars, to be paid to the said George Hill, his executors, , and assigns; to which payment, well and truly to be made and done, they bind themselves, their successors, heirs, executors, & ad., respectively, jointly and severally, firmly by these presents, sealed with their seals, and dated this twelfth day of October, A. D. 1870.

Whereas, the said Chesapeake and Ohio Canal Company hath prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered by the supreme court of the District of Columbia in a cause wherein said George Hill was complainant and said Chesapeake and Ohio Canal Company was defendant:

Now the condition of the above obligation is such, that if the said Chesapeake and Ohio Canal Company shall prosecute their said appeal with effect and answer all damages and costs if they shall fail to make

good their plea, then this obligation shall be void; it shall other-
85 wise remain in full force and virtue at law.

JA'S C. CLARKE, [SEAL.]
President.
W. W. CORCORAN. [SEAL.]

Test:
BERRY FAWCETT, *Clk.*

86 *Citation.—Filed Oct.* 27, 1870.

In the supreme court of the District of Columbia. October 27, 1870.

GEORGE HILL, J'R, COMPLAINANT,
vs.
THE CHESAPEAKE & OHIO CANAL Company, defendant. } In equity. No 739.

To the complainant in the above-entitled cause:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to an appeal prayed by the defendant this day in open court here, from the decree of this court pronounced herein on the 28th of January, 1868, to show cause, if any there be, why the said decree should not be corrected and speedy justice done the parties in that behalf.

Witness, D. K. Cartter, chief justice of the supreme court of the District of Columbia.

D. K. CARTTER,
Chief Justice.

Service of citation.—Filed Oct. 28, 1870.

1870, Oct. 28. I, George W. Phillips, deputy marshal of the U. S. for said district, make oath that, on the 28th day of Oct., 1870, I served on the appellee, the complainant in said cause, by exhibiting to him the above citation of appeal by defendant herein, and delivering him a copy thereof.

G. W. PHILLIPS,
Dep'ty Mar. D. C.

Sworn to and subscribed before me this 28th of Oct., 1870.
R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clk.

(Indorsement on cover:) No. 442. The Chesapeake and Ohio Canal Company, appellant, vs. George Hill, j'r. Dist. of Columbia sup. court. Filed 23d December, 1870.

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In the Supreme Court of U. S.

THE CHESAPEAKE AND OHIO CANAL COMPANY
vs.
GEORGE HILL, JR.
} No. 226.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

WALTER S. COX,
of Counsel for Appellant.

In the Supreme Court of U. S.

THE CHESAPEAKE AND OHIO CANAL COMPANY
vs.
GEORGE HILL, Jr.
No. 226.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Statement and Brief of Appellant's Counsel:

The appellee, in contemplation of the erection of a paper-mill, at Georgetown, D. C., and some months in advance of its erection, (see Bill p. 1, of Record,) entered into an agreement with the appellant, called a water lease, dated January 21, 1864, by which the privilege was granted to him, for the term of twenty years, from July 1, 1864, "to draw off from the Chesapeake and Ohio "Canal, at Georgetown, to be used at his property * * * "*so much water as will pass through an aperture of two* "*hundred square inches* in an iron plate not exceeding "one half inch in thickness, to be used solely for propel- "ling the machinery of a paper-mill and appurtenant "works."

The grant is expressed to be subject to certain conditions, viz:

1. The aperture is to form so many inches in height, and so many in length, in the clear, as may be necessary to make the number of square inches aforesaid.

2. The aperture is to be so placed that *its lower edge shall not be nearer to canal bottom proper than two feet.*

3. The aperture is to be made plain and square through the plate, and no device is to be attached to increase the flow of water.

4. A sliding-gate is to be placed in front of the aperture, so as to stop the flow wholly or partially.

5. The forebay or trunk for conducting the water *through the canal bank, from the aperture*, is to be covered, and so constructed as not to interfere with the navigation of the Canal, &c., &c., &c.

It is further provided, that the officers of the Company shall have access to the premises, for examination, &c., and it is covenanted, that if any quarterly instalment of water rent be in arrears, or the lessee shall fail to comply with any of the conditions of the lease, *or shall alter or enlarge the forebay, or trunk, or aperture, &c., without the written consent of the Canal Company*, the water may be shut off by closing the sliding gate until amends be made, &c., &c.

See Printed Record, p.p. 3 to 7.

The defendant afterwards erected his mill and constructed a solid stone culvert as a forebay, through which to convey the water to his mill; and instead of the ordinary over-shot wheels used by the grist mills, adopted a turbine wheel for his mill and so arranged his machinery as to make it impossible for him to receive, through any given aperture, as much water as an over-shot wheel would receive through the same. See depositions of Manning and Hutton, p.p. 21, 22, 25, and 26 of Printed Record.

Consequently, it appears, that the appellee was mis-

taken in his calculations, and that the quantity of water leased to him was insufficient to propel his mill.

It is charged by the appellant, that he forcibly removed the gauge, so as to receive an unlimited flow of water through the forebay, and that the officers of the Company were about to shut off the water entirely, when the Company were induced by his appeals to agree to give him more water.

On the 10th of May, 1866, the Board of Directors of the Canal Company passed a resolution, "that the Engineer and General Superintendent of the Canal be "directed to ascertain, as early as practicable, the quantity of water required at the mill of George Hill, Jr., "and, when ascertained, if the allowance of said quantity "can be permitted without detriment to the navigation "tion of the canal, that such additional quantity be "granted, and that a suitable guage *to embrace the whole* "*quantity* (*inclusive of the* 200 *inches now leased*,) be prepared and placed at the proper point, and that a lease "be executed for such additional quantity of water power "*upon the usual terms*, on payment of a bonus of $5 per "inch for such additional quantity of water power.

This seems not to have been acted on, and on the 1st of June, 1866, the Board passed another resolution, "that "the Engineer and General Superintendent of the Canal "be directed to ascertain, as soon as practicable, the additional quantity of water required at the mill of "George Hill, Jr., and that a suitable gauge for such "additional quantity, inclusive of 200 inches now under "lease, be placed at the proper point, and when such "additional quantity be ascertained, that said Hill be "required at once to pay the bonus of $5 per inch, otherwise, that the water be reduced to the original 200 "inches."

(Printed Record, p.p. 11 and 12.)

On the 21st of May, the appellee signed a paper agreeing to take and pay for the additional quantity of water according to the terms and conditions of the resolutions of May 10th, (Printed Record, p. 18.)

The engineer of the Company and the appellee's foreman experimented, to ascertain the quantity of water necessary for the mill. The stream of water was received already, of the full width of the forebay, and the only method of ascertaining the volume required was, gradually to raise the slide, until a sufficient quantity to propel the mill flowed through. This was done, and it was thus ascertained that the quantity requisite was so much water as would flow through an aperture of seven hundred inches, or, five hundred inches more than the aperture originally agreed upon.

(Manning's Deposition, p. 21, Printed Record.)

The officers of the Company, at the next quarter day, required him to pay the bonus and quarter's rent upon the additional 500 inches, which he refused to do. They were then about to shut off the water when this bill was filed for an injunction. A temporary injunction was granted. After answer, amended bill and testimony taken, and report by Special Commissioner, the injunction, by final decree, was made perpetual, for the period of appellee's lease, as to so much water as will pass through an aperture of 700 square inches *into the forebay now used by appellee*, provided he shall pay a bonus of $5 per inch upon 217 square inches in addition to his original 200 inches, and arrears for rent upon 417 square inches, as long as he shall continue to pay rent, quarterly upon said additional 217 inches.

The error assigned in this decree is, that it makes an entirely new contract for the parties.

The theory of the original bill was, that the Canal Company had stipulated to furnish a *certain quantity* of water; that he was entitled to draw off from the canal 200 *inches of water*, whereas in consequence of the loss by friction, the actual quantity received by him at the point where it begins to be useful, to wit: at the wheels of his mill, 350 or 400 feet distant from the canal—was only 108 inches.

His claim is two fold: First, he claims that he is entitled to have the guage placed near his mill-wheel, where the discharge would be most effective; and secondly, he claims that he is to pay according to the volume or quantity of water there delivered.

As to the first, it is sufficient to say that the claim is wholly groundless. The lease expressly provides that the sliding gate, (or guage) is to be placed in front of the aperture *from which* the forebay is to be constructed *through the canal banks*, which necessarily requires the guage to be on the canal bank. (Printed Record, p. 4.)

The privilege was granted to certain millers of locating their guages where it might be most advantageous upon certain conditions, but the appellee never became a party to the arrangement. (Printed Record, p 12.)

As to the second claim, viz: that the rents were to be proportioned to the quantity of water received, the lease expressly contradicts it, and the oral testimony also.

The lease gives, *not so many inches of water*, but *so much water as will pass through an aperture of* 200 *square inches*—(Printed Record, p. 4.) It is obvious, that the quantity that will pass through such an aperture will vary with different conditions. If the aperture be near the bottom of the canal, the pressure from above, or the head, as it is called, will force through a larger quantity than if the

aperture be near the surface where the pressure is inconsiderable.

But the shape and location of the aperture are left entirely to the judgment and discretion of the lessee, with the single condition that the lower edge of the aperture be not nearer than two feet to canal bottom. In this case, it will be seen that the appellee has the whole benefit of his grant and more, for 1, he draws the water through the full width of his forebay, and 2, the lower edge of the aperture is only 20 inches, instead of 24 from canal bottom. He could not therefore receive the water through the forebay constructed by himself under more favorable conditions than at present.

The original lease there bound him to pay $5.00 per annum, for so much water, more or less, as would pass through an aperture of 200 square inches, *i. e.*, at the rate of $2.50 per *square inch of aperture*. The resolutions of the Board of Directors increase the quantity which is to be allowed to draw, indefinitely, *i. e.*, to just so much as is necessary to propel the mill, and direct a new lease to be executed *for such additional quantity, on the usual terms*. (Printed Record, pp. 11, 12.)

What were the usual terms? The only testimony on the subject is that of Mr. Ringgold, who had been clerk and treasurer of the Canal Company for more than 20 years. He testifies that the appellee's lease is *the usual form of leasing*, there had never been any other form; that in 1855 the Board determined to lease 1200 inches of water, by which was intended *inches of aperture* through which the water was to be delivered at the rate of $2.50 per inch of aperture for the first 10 years, and $3.00 for the second 10 years—precisely the terms of appellee's lease; that all leases since 1855 have been made on these terms; and that the Company never have

leased or charged according to the quantity of water, or otherwise than according to the aperture. (Printed Record, p. 24.)

The appellee's own testimony shows, that however hardly this rule may operate in some cases, this practice is not a novelty, but in at least one place—Patterson—the same course is pursued. (Printed Record, p. 23.)

The only hardship in this case is the result of the appellee's own miscalculation. He obtained his water grant first, and then erected his mill, with such machinery that the water leased by him was insufficient to propel it. He then obtained all the water that he needed, on the same terms that were usual in all water leases, and found that those terms were onerous because his peculiar machinery required a more extended grant than usual, and therefore seeks to change the terms of his contract by the authority of the Court. (See Hutton's testimony, p. 26 of Printed Record.)

But having shown that the usual terms of leasing were $2.50 for each inch of aperture we have established that the appellee was bound to pay for the additional 500 inches of aperture.

This was made apparent by the answer to the original bill and the Exhibit, which was a copy of the lease.

The appellee then filed an amended bill, in which he shifted his ground entirely.

In the amended bill, he admits that the new arrangement was merely *an enlargement of his original grant and that the rule of measurement is the same as prescribed in the original contract.* He simply claims, that in ascertaining

the quantity of water, or the size of aperture necessary, the Company's officers ought to have enlarged the aperture *horizontally*, more than *perpendicularly*, on the principle, that the greater pressure at the lower depth would have made a smaller number of additional inches sufficient for a given work than would have to be added perpendicularly.

And this, be it observed, *is the sole answer given on the record, to the proof, that the appellee was bound to pay according to the number of inches of aperture.*

The answer to this pretension is complete. It was the appellee's own act that made the mode of measurement adopted the only one practicable. The forebay was of his own constructton. The lease comtemplated a construction of the forebay by the lessee, subject only to the approval of the officer of the Company. (Printed record, p. 4.) The forebay, of course was always constructed of such width as to be adapted to the machinery. It would not, for instance, be wider than the mill-wheel, for, as to the excess of width, the stream of water paid for would simply be wasted. The appellee had made his forebay of solid stone and in his lease, *stipulated that it should not be enlarged without the written consent of the Company* (Printed Record, p. 4.) It is not pretended, anywhere, in the record, that he even applied for that consent; much less, that it ever was granted. On the contrary, he expected to get the additlonal water by a vertical addition to the column of water, and his own foreman assisted in making the measurement in that way; nor did he ever dissent from it. (Printed Record, p. 21, Manning's testimony.)

Now it is plain, that the mode of measurement which he says, ought to have been adopted, viz: by lateral instead of vertical extension of the aperture, could not

have been adopted without enlarging the forebay, which he had no right to do, which he could not do without considerable expense and without changing his machinery, and which he never sought nor desired to do.

This excuse then, for not paying on the usual terms has no foundation and is a mere after-thought.

But it is completely disposed of, as far as this appeal is concerned, by the action of the Court below.

The decree does not direct that the appellee may draw the water through an aperture wider than his existing forebay and shall pay for only so many inches of aperture as he may require under those conditions, but allows him to draw it through an aperture of 700 square inches, *into the forebay at present in use* by him, which can only be done by increasing the column vertically. (Printed Record, p. 27.) And yet the Court, assuming, as we contend, that according to contract and usage, he he was bound to pay according to the number of inches of aperture, allow him to go on drawing through 700 inches of aperture and yet to pay for only so many inches of aperture as he would need under entirely different conditions, *i. e.*, if his machinery and forebay were different.

They do not adopt a different standard of measurement, and charging from the one we contend for, but instruct their special commissioner, (Printed Record, p. 25,) to report how many *square inches of aperture*, situated at the distance of two feet from the bottom of the canal, and of the width of complainant's forebay, would furnish a flow of water, equivalent, in power and effect, to the additional water received by complainant, under the resolutions of May and June, 1866; and upon his reporting that under these hypothetical conditions, an aperture of 217 inches would suffice, they pass a decree that he is to

be charged only for 217 inches of aperture in addition to his original 200 inches. In other words they hold, that though by his contract, he is to be charged according to the number of square inches through which the water is drawn to his mill; yet, inasmuch as the peculiar machinery of his mill requires an inordinately large aperture he ought not to be required to pay according to his contract but only for such aperture as he would require with a different mill, different machinery and different forebay. If this is not making an entirely new contract for the parties it is difficult to conceive what language would do it.

The decree is plainly erroneous in another respect.

It continues the injunction, provided the appellee shall continue to pay rent quarterly on *only* 217 *inches*, while it recognizes his obligation to pay a bonus on 417 inches and the appellee's own pretensions and proof look to a continued payment of rent on 217 inches, *in addition to his first grant.*

It is therefore submitted that the decree below ought to be reversed and the bill dismissed entirely, or that the injunction should be continued only on condition of the appellee's payment of the bonus upon the full 500 additional inches and of all arrears of rent upon the same and of his continued payment hereafter of the water rent upon the full 700 inches, per quarter.

WALTER S. COX,
of Counsel for Appellant.

Supreme Court United States.

DECEMBER TERM, 1871.

The Chesapeake and Ohio Canal Company
vs.
GEORGE HILL, Jr.
} No. 226.

BRIEF OF APPELLEE.

McGill & Witherow, Printers, 1107 E street, Washington, D. C.

Supreme Court of the United States.

DECEMBER TERM 1871.

THE CHESAPEAKE AND OHIO CANAL COMPANY
vs.
GEORGE HILL, Jr.
No. 226.

BRIEF OF APPELLEE.

This is an appeal from a decree of the supreme court of the District of Columbia, establishing the right of the appellee, under a contract made between him and the appellant, to draw water from the Chesapeake and Ohio canal, and the bonus and rent payable by the contract.

The decree was rendered on the 25th of January, 1868, nearly five years ago. The bonus and rent fixed by the decree were paid and accepted without objection, and the latter has continued to the present time to be so paid and accepted.

On the 27th of October, 1870, nearly three years after the rendition of the decree, an appeal was taken.

THE CASE.

The appellee is the owner of a paper-mill in Georgetown, in this District. Before the erection of the mill he obtained a lease from the Chesapeake and Ohio Canal Company for two hundred inches of water. (This lease will be found in Record, pages 3, 4, 5, and 6.) After the erection of the mill, at the cost of many thousands of dollars, it was found that the water leased was insufficient to propel the machinery. This was in consequence of the fact that the com-

pany, whilst allowing other millers to fix their gauges at the wheels, refused this privilege to the appellee, and insisted on his gauge being placed at the canal bank, whereby the water, when it reached his machinery, distant between three and four hundred feet, became of little or no value for the purpose for which it was leased.

It will be conceded that, by allowing lessees to place gauges at their wheels instead of at the canal bank, the company parts with no more water than it has agreed to furnish, (Record, page 26;) but simply refuses to take advantage of an impediment to the use of the full quantity of water leased, whilst accepting the full amount of rent agreed to be paid. But it is not proposed to enter into this part of the controversy. Suffice it to say, that after the erection by the appellee of his mill, it was found that the two hundred inches of water leased were, when gauged at canal bank, as required by the company, wholly inadequate to turn the mill.

This state of things led to the passage by the company, at the instance of the appellee, of a resolution, the whole object of which was to remedy the existing evil.

This resolution is set out at page 11 of the record, and has date the 10th of May, 1866. It is in these words:

"*Resolved*, That the engineer & gen'l superintendent of the canal be directed to ascertain as early as practicable the quantity of water required at the mill of George Hill, jr., and when ascertained, if the allowance of said quantity can be permitted without detriment to the navigation of the canal, that such additional quantity be granted, and that a suitable *g*uage to embrace the whole quantity (inclusive of 200 inches now leased) be prepared and placed at the proper point, and that a lease be executed for such additional quantity of water-power upon the usual terms, on payment of a bonus of $5 per inch for such additional quantity of water-power."

The resolution was duly agreed to by the appellee, and the officers of the company required him "to accept and agree to the terms of said resolution in writing, in order that there might be no room for controversy thereafter."

(See Answer of Company to Amended Bill, Record, p. 17.)

The acceptance and agreement of the appellee was as follows:

"WASHINGTON, *May* 21, 1866.

"I hereby agree to take *as* (should be *and*) pay for the additional quantity of water requisite for my mill, according to the terms and conditions of the resolution of the Board of the Chesapeake and Ohio Canal Company, passed on 10th inst.

"(Signed) GEORGE HILL, JR."

(See Record, p. 18.)

These two papers constituted the contract between the appellee and the company. The former was to have, in consideration of the bonus and rent, the additional quantity of water required at his mill, provided only such quantity could be furnished "without detriment to the navigation of the canal;" and a suitable gauge, to embrace the whole quantity, including the two hundred inches already leased, was to be prepared, and a lease was to be executed for the additional quantity of *water-power* upon the usual terms, and a payment of $5 per inch for the additional quantity of *water-power*.

The above proviso, making the rights of the appellant subordinate to the interests of navigation, has no bearing upon the present case. It is not relied on in defence against tbe appellee; and, besides, is a condition in all leases, (Record, 6, &c.;) and, indeed, made such by the charter of the company, which prohibits the lease of any water other than surplus water not required for navigation.

Some days after the above agreement and acceptance was delivered to the company, and on the 1st of June, 1866, the board passed another resolution, as follows:

"*Ordered*, That the engineer & gen'l sup't of the canal be directed to ascertain as soon as practicable the additional quantity of water required at the mill of George Hill, jr., and that a suitable g*uag*e for such additional quantity, inclusive of 200 inches now under lease, be placed at the proper point, and when such additional quantity be ascertained, that said Hill be required at once to pay the bonus of $5 per

inch; otherwise that the water be reduced to the original 200 inches."

The passage of this resolution, as stated by the appellant, was induced by the delay of the engineer of the company in executing the resolution of the 10th of May. (Record, p. 8.)

It is referred to as distinctly recognizing the contract, which at the time existed between the appellee and the company. The latter, having before it the above acceptance and agreement of the appellee, urged forward the *execution of the contract*, and orders that, as soon as the additional quantity is ascertained, the appellant *be at once required* to pay the sums agreed on.

The engineer and superintendent then proceeded to execute the orders contained in the above resolutions; and, strange as it may appear, he adopted the following process: He found that the gauge had to be extended upwards to a point five inches below the surface of the water (Record, 23) in order to propel the machinery of the mill, and that the increase of aperture was five hundred inches, in addition to the original aperture of two hundred inches; and he thus reached the sapient conclusion that the appellant required five hundred additional inches of water, and was chargable with the bonus and rent in that amount. The process was certainly original. It utterly excluded all the *conditions* governing the flow of water, and made the size of the aperture the standard of right and responsibility.

It does not appear and is not contended by the appellant that it ever undertook to prepare and place *at the proper point* the gauge embracing the whole quantity of water called for by the above resolutions, or demanded the appellee to prepare and place such gauge.

The additional water (or rather additional aperture) being thus ascertained by the above officer to his satisfaction, the company demanded for the quarter ending the 30th of June, 1866, as well the quarter's rent under the lease ($125) as $2,500 bonus on the five hundred additional inches, and the further sum of $316 67 for rent of said additional inches, (although the additional inches had not been contracted for

until May 21, 1866,) and threatened if the said sums, amounting to $2,816 67, were not paid, in addition to the rent under the lease, to cut off wholly the supply of water from the mill. (See Original Bill, Record, pp. 2, 3, and Answer, pp. 8, 9; and also Amended Bill and Answer, Record, pp. 16 to 20.) This led to the filing of the bill on the 30th of July, 1866, praying an injunction against the injury threatened. (Record, pp. 1 to 3.) Subsequently an amended bill was filed, setting up more distinctly the contract, evidenced by the above resolution and acceptance, and offering to perform the same, and praying that, upon payment of what was due thereunder, the company might be enjoined as prayed in the original bill. (Record, 16, 17.)

The injunction was granted on payment into court of the said sum of $2,816 67. (Record, 20.) And subsequently, by consent, all rent subsequently accruing according to the pretensions of the company was ordered to be paid into court. (Record, 22.)

On the 1st of August, 1867, W. R. Hutton (then, and after October 1, 1866, the engineer and superintendent of the company,) was appointed by the court a special commissioner to inquire and make report to the court upon certain questions, and asking them the following:

"3. How many square inches of aperture, situated at the distance of two feet from the bottom of the canal, and of the width of complainant's forebay, would furnish a flow of water equivalent in power and effect to the additional water received by the complainant under the resolutions of May and June, 1866, exhibited in this cause, over and above his original grant?"

His report will be found, Record 25 and 26. And in respect of the above question, he reported that the additional five hundred inches provided for by the contract were merely the equivalent of two hundred and seventeen inches drawn two feet from the bottom, and under the conditions of the lease. (Record, 26.)

The decree of the court will be found, Record, 27. It, in substance, holds that the appellee was bound to pay the

additional bonus and rent, not for *the additional aperture only*, but for what would be, under the conditions of the lease, the equivalent, in respect of water-power, of the additional aperture; or, in other words, that as the five hundred additional inches drawn near the surface was the equivalent of only two hundred and seventeen inches drawn according to the conditions of the lease, the appellant was bound to pay bonus and rent for the latter, and no more.

POINTS IN BEHALF OF APPELLEE.

I. The fact of contract is not, and cannot be, controverted. It is evidenced by the resolution of the 10th of May, 1866, and its acceptance by the appellee; and further, by the alleged ascertainment of the additional water requisite, and the effort, until stopped by the court, to enforce payment of the additional bonus and rent.

The extravagant pretensions of the appellant, as to the proper construction of the contract, necessarily admits its existence, and the brief filed in this court assigns error in the decree, not because it asserts that a contract in fact existed, but because of an alleged erroneous construction placed by the court below upon the admitted contract.

There is but a single question, then, before this court: whether the court below erred in the construction of the contract.

II. The construction of the contract by the decree was right.

In Nash *v.* Towne (5 Wall., 689, 699) this court says: "Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and to judge of the meaning of the words and of the correct application of the language to the things described."

Again, it is laid down in Noonan *v.* Bradley, (9 Wall.,

394, 407:) "When an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."

These rules, applied to the present contract, will leave, it is submitted, no shadow of doubt as to its proper construction.

Here is a miller, a water-lessee, without water enough under his lease to turn his mill. He applies to his landlord for more, and it is agreed he shall have the requisite quantity. So far there is no dispute. But the agreement goes on to provide: 1. That a suitable gauge to embrace the old and new grant shall be prepared and placed at the proper point; and, 2, that a lease be executed for the additional quantity of WATER-POWER, *on the usual terms*, on payment of a bonus of $5 per inch for such additional quantity of WATER-POWER.

Now, according to the very letter of the agreement, the lessee is to have additional WATER-POWER, and is to pay for that WATER-POWER on the usual terms. And what are the usual terms? Why, it is admitted $2 50 per inch for water drawn through a gauge placed two feet from the bottom, or, what is the same thing, under a four-foot head, the depth of the canal being six feet. The resolution, it will be observed, calls for *water-power*. The lessee is then not to pay for a mere enlargement of the gauge, but only for the "additional quantity of water-power resulting from such enlargement. None knew better than the officers of the appellant the meaning of "water-power," thus introduced *ex industria* into the contract. None knew better the condition of the appellee's forebay, any change of which would involve large expense, nor the fact that the enlargement of the old aperture upwards to the surface of the water would not, in proportion to the additional opening, represent the same quantity of water-power as the old aperture two feet from the bottom; but that, as the enlargement neared the surface, the water-power would become less and less. Hence the word "water-power" was studiously

used in the contract, that the new grant might be assimilated in all essentials to the old one.

This construction is confirmed by the conduct of the appellant in carrying out the contract. What did it do? Why it simply enlarged the old aperture upwards, leaving the forebay of the appellee untouched. After this enlargement it does not claim for additional water-power, but says to the appellee: "I have added so many square inches to your gauge, and claim to be paid bonus and rent for so many additional inches of aperture." But the answer of the appellant is conclusive: "I never agreed to pay you for additional inches of aperture, but, as shown by the very words of the contract, for the additional 'water-power.'" Such was the view of the court below, which held, that the parties to the contract struck hands over the existing condition of things.

An ingenious argument, made below, is, however, repeated in this court. The conclusion of that argument is, that the appellant, getting but two hundred and seventeen inches of water-power according to the conditions of the canal leases, ought to pay the bonus and rent on five hundred inches of water. Such a conclusion would seem of itself to dispose of the argument. The process by which the conclusion is reached is as follows: The resolution of the 10th of May calls for the execution of a lease "on the usual terms," and inasmuch as one of the provisions in such leases is, that the lessee is charged at the rate of $2 50 per square inch, according to the aperture, therefore it follows that here the appellee must be charged according to square inches, and not according to what he bargained for—water-power.

The fallacies in this argument are, however, manifold and apparent.

1. It entirely ignores the situation of the parties, and rests exclusively upon a forced construction of the words, "on the usual terms." These words probably had reference to the terms of payment, but it extended further. The only rational construction of them is, that they were intended to embrace the usual provisions of the leases so far as consist-

ent with the new contract. If, as strenuously contended by the appellee, the condition of the forebay was such as to admit of a larger gauge only by the vertical enlargement of the old one, then this fact, known to the contracting parties, is to be considered, in order to ascertain the intention of the parties, and conclusively shows what that intention was. And the conduct of the appellant, in executing the contract by extending vertically the old gauge, is equally conclusive.

2. But the construction put upon these words, "on the usual terms," proves too much. The most important provision of a lease to lessees is what they shall pay. It is conceded that the uniform rent is $2 50 per inch for water drawn through an opening placed two feet from canal bottom or under a four-foot head. The rent is according to an assumed supply of water under a certain head, delivered at the canal bank; and conceding that the water, when delivered, is at the risk of the lessee, and he must utilize it as best he can, still, the head under which the water is delivered is the main element in respect to rent, for the head fixes the quantity delivered. Is it not, then, absurd to say, that when a four-foot head is a uniform provision or term in such leases, it is according to the "usual terms" to charge at the same rate for water drawn under a less head, or under next to no head at all?

The vice of the argument consists in wholly overlooking the conditions of the leases, which enter alike into the water and the rent, determining the amount of the latter and the quantity of the former.

If these conditions are borne in mind, the extension of the words, "on the usual terms," beyond terms of payment, only strengthens the construction of the court below. The leases had established a certain ratio between water drawn under certain conditions and rent, and the parties intended by the above words that this ratio should be extended to the new grant. As water drawn under a four-foot head was paid for at a certain ratio, so water drawn under a lesser head should be paid for in the same ratio. Of course the lessee will pay less per square inch in the latter case, for

the simple reason that he receives less water. But the ratio or proportion of rent to water is maintained, and that, it is submitted, was the manifest design of the parties.

3. The answer, however, to the whole argument is to be found in the fact, that what the resolution granted and the lessee agreed to pay for, was water-power. The leases had in substance established a fixed rent for water-power. Water flowing under a certain head means water-power. The rent of this water, however, had been fixed, and the same rent was to be paid for the new water-power. This is what the contract declares on its face. But the claim of the appellant is to charge, irrespective of water-power or benefit received.

4. The language of the resolutions is to be taken most strongly against the party using it—*contra proferentem*—and so as to avoid wrong and injury.

2 Parsons on Contracts, 504, 510.

III. There appears in the decree a clerical error. The rent which the lessee is required to pay is, it appears, two hundred and seventeen inches, instead of four hundred and seventeen inches. In fact, bonus and rent have been paid on the latter quantity, and the proper correction is agreed to.

W. D. DAVIDGE,
Solicitor for Appellee.